United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7147

To be argued by
CHARLES F. MCGUIRE

United States Court of Appeals
FOR THE SECOND CIRCUIT

JULIE BAKER,
Plaintiff-Appellee,

against

THE CITY OF NEW YORK,
Defendant-Appellant,

and

ROBERT E. BLISS, STUART V. SCHILLER,
LEE E. JOHNSON,
Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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Preliminary Statement

This is an action to recover damages for personal injuries sustained by the then 18 year old plaintiff while a passenger in a Cadillac limousine which was struck broadside by a Ford Thunderbird at about 1:40 A.M. on December 23, 1973.

More specifically, the accident occurred when the Thunderbird, fleeing at high speed from a police car that was chasing it for a mere traffic violation, ran a red traffic

light at Lexington Avenue's intersection with 80th Street and struck the Cadillac limousine in the middle of its left side as the latter proceeded into the intersection from 80th Street with the green light in its favor. As it eventuated, the Thunderbird had been stolen but it is undisputed that the pursuing police officers did not acquire that information until after the accident.

The police officers also conceded that they had noted the license plate of the Thunderbird early on in the chase. That information and a description of the car could have been radioed to other units in the area with a request for assistance in intercepting the traffic violator, thereby avoiding the high speed chase that resulted in the collision. The use of the radio was clearly the appropriate course to follow especially since the police conceded that they could not have overtaken the Thunderbird on speed alone (67, 89).

As discussed more fully hereinafter, plaintiff adduced uncontradicted expert testimony

(i) that the high speed chase contravened good police procedure which placed the protection of the public's safety over the issuance of a traffic violation (97-8, 108-110, 147-8a; see, also, pltf.'s exh. 18),* and

(ii) that once the police realized the driver of the Thunderbird was attempting flight, proper police procedure would have been for the pursuing police to have turned off the siren (assuming, *arguendo,* that it was on as the police claimed) and overhead flashing light, to have followed "discreetly", "to have held their distance back" and to have radioed for assistance (107-9, 111, 148-148a).

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* Unless otherwise indicated, numbers in parentheses refer to the appendix.

The Disposition Below

Following a trial before Hon. Dudley B. Bonsal and a jury in the United States District Court for the Southern District of New York, the jury rendered a special verdict that found defendant City of New York to be solely at fault and awarded plaintiff $175,000.00 (208-9, 212-3). Judge Bonsal denied a post-verdict motion by the City to set aside the verdict on liability as against the weight of the evidence and as contrary to law and on damages as excessive (34a-40a, 44a).

The jury exonerated Robert Bliss, the driver of the Cadillac limousine (209, 213). The action had already been discontinued against Stuart Schiller, the owner of the stolen Thunderbird (94).

The action was abandoned as against defendant Lee Johnson who was arrested at the accident site by the pursuing police officers as the man whom they claimed was driving the Thunderbird. He was later charged with the attempted murder of one of those officers who also claimed that Johnson had tried to run him down when the officer allegedly tried to stop him, of which more later. Johnson, a black man, insisted from the moment of his arrest through the fourteen months he was in prison awaiting trial that he was merely a passenger in the Thunderbird, sleeping and intoxicated, having been offered a lift by a white man whom he had met at a party. He swore that the white man jumped from the car and ran from the scene immediately after impact (37-41).

Johnson was acquitted of all criminal charges lodged against him (41), including the alleged attempted murder of the police officer. That acquittal resulted primarily from the fact that a distinterested eyewitness (Michael Ferder), who reported what he had seen to a sergeant at the 67th Street precinct a day or two after the accident, testified at Johnson's criminal trial and corroborated the

latter's story to the extent of stating that immediately after the accident a white man got out of the Thunderbird on the driver's side and ran away (171-4).

Question Presented

Does the evidence sustain the jury's finding that the pursuing police officers were negligent and that their negligence was the proximate cause of the accident?

We submit that the question should be answered in the affirmative. We contend that the pursuit by the police to issue a summons for a minor traffic violation in such manner as to result in a chase, with the pursued car and the police car ultimately reaching a speed at the time of the collision in excess of 70 miles an hour, was unreasonable and showed a lack of regard for the safety of the public in contravention of good police practice (cf. *Myers* v. *Town of Harrison,* 438 F.2d 293, 296, cert. den. 404 U.S. 828 [2d Cir. 1971]).

It should be noted at the outset that plaintiff has never contended nor does she now contend that the police officers should not have pursued the Thunderbird; rather, plaintiff contends that the *manner of pursuit* (through City streets culminating in speeds up to 70 or 75 miles per hour on a main City artery) constituted actionable negligence in that it evinced a reckless disregard for the safety of other cars in the area, especially when it is considered that police policy (taught as part of an officer's training) mandated a different, safe and far more effective method of pursuit.*

Moreover, the principal issue presented on this appeal is patently misstated by defendant at page 3 of its brief. The

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* Throughout the trial of this case the terms "chase" and "pursuit" were used interchangeably and are so employed in this brief.

issue, as framed by defendant, proceeds on the theory that the accident occurred "within a few seconds" after the Thunderbird had stopped and "suddenly took off at great speed" (Deft.'s Br., p. 3). As shall be discussed fully hereinafter, the jury clearly had the right to conclude that the Thunderbird had not stopped at all from the time the officers first commenced pursuit, with the police car's flashing red light on, at 82nd Street and First Avenue until the collision at 80th Street and Lexington Avenue (a distance encompassing seven long City blocks).

The Facts

Preliminary

It is fundamental that plaintiff as appellee is entitled to the benefit of the most favorable inferences that may reasonably be drawn from the evidence (*Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 [2d Cir. 1976]). When so construed, the record reveals the following:

Site of the accident

Lexington Avenue at 80th Street was a one-way southbound main thoroughfare about 100 to 150 feet wide (4h, 5, 130). 80th Street ran one-way eastbound (2). There was a traffic light at the Lexington Avenue-80th Street intersection (4d).

At the time of the accident the weather was clear, the road was dry and the street lights were on (33, 33c, 33d).

The collision

Sometime after midnight Robert Bliss, the owner and driver of a four door Cadillac limousine picked up nine people including plaintiff at the Park Avenue entrance of the Waldorf-Astoria (1, 4b, 4c). He then drove them up Park Avenue to 80th Street where he made a right turn toward Lexington Avenue (2). As he entered the intersec-

tion of Lexington Avenue and 80th Street at about 15 to 20 miles per hour and with the light in his favor, he looked to his left (3, 4f, 4g, 4h, 6). At that juncture the southbound Thunderbird was "coming on top of [him] at a high rate of speed" and hit the limousine broadside at the point of the partition between the two left side doors (3, 5, 7, 8a).

He saw a flashing red light about a block and a half away but heard no siren (4, 10). He testified that his window was up in the car (4).

Rose Gregorio, sitting next to him, was looking ahead and did not see the car that hit the limousine (11-12). She did not hear a siren or see a fleshing red light (13).

Howard Camac, seated next to Mrs. Gregorio in the front seat, did not hear a siren, although the window on his right was slightly open (23-4). He could not recall whether he had seen a flashing red light (23).

Donna Amarino, seated in the back of the limousine on the far left side next to a closed window, heard no siren (20-1). She saw no flashing red light, explaining that she "was not focusing on the traffic" (20).

Neither plaintiff nor Diane Camac, both seated in the back, heard a siren or saw a flashing red light prior to the collision (26-7, 93).

Two other passengers (Vincent La Jana and Cheryll Ohman) remembered nothing (14, 35-6).

Until indicated otherwise, the following sequence of events is taken from the testimony of the two officers who chased the Thunderbird. As discussed more fully *infra,* the Court properly charged that their credibility was a question of fact for the jury (191).

The officers' testimony concerning events preceding the collision—commencement of the pursuit at 82nd Street and First Avenue

Officers Francis Gallagher and Kenneth Jaques were cruising in a Plymouth stationwagon that was operating as a radio motor patrol car. It was fully marked and equipped with a siren and a red light on top (44-5). Officer Gallagher was driving.

When they first saw the Thunderbird it was not going very fast (46). They saw it pass a signal light on 82nd Street and First Avenue and head north along First Avenue, whereupon Gallagher commenced pursuit by accelerating the speed of the police car (46-7). The Thunderbird turned into 83rd Street at about 30-35 miles per hour with the police car travelling behind it at approximately the same rate of speed (49). The police car's red light was on although the siren was not (49).

The lights were green at Second and Third Avenues and the Thunderbird proceeded without stopping until it reached a point about 50 feet short of Lexington Avenue where it allegedly stopped because there were cars ahead of it that had stopped for a red light (49-50, 51-2).

Officers' testimony concerning the alleged events at 83rd Street and Lexington Avenue

Cars were parked on both sides of 83rd Street which left approximately two moving lanes of traffic (50-1). There were a couple of cars ahead of the Thunderbird waiting for the light to change (52). There was also a double parked car on the left side of 83rd Street and, according to the officers, the Thunderbird stopped on the left side of 83rd Street but slightly to the right and a few feet behind the double parked car (52-3, 57-8, 115, 117). The police car stopped about 10-15 feet behind the Thunder-

bird and slightly to the right (55, 136). On an examination before trial Officer Jaques testified that the police car could have passed the Thunderbird on its right if they "chose to do so" (116). The Thunderbird allegedly remained stopped for a minute or two (63).

Instead, however, Officer Jaques allegedly alit from the police car, went to the Thunderbird's right front fender, stood in front of the car and called to the man behind the wheel to stop and turn off the motor (50, 58, 137). The officers stated that they observed only one man in the car who was sitting behind the wheel and described him as a black man with a mustache (54).

At that point the light turned green and the driver of the Thunderbird allegedly looked at Officer Jaques, turned the steering wheel to the right and accelerated (59, 60). Officer Jaques, who allegedly jumped onto the hood of a parked car, claimed that the driver had tried to run him down although contact was not made (60, 137). Officer Gallagher pulled up alongside Officer Jaques who reentered the car. They proceeded in pursuit allegedly with the siren and the flashing red light on (60, 118).*

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* Defendant's brief (pp. 20-2) proceeds on the self-serving assumption that a stopping hiatus in the pursuit actually occurred on 83rd Street at Lexington Avenue. The jury did not have to so find. Judge Bonsal specifically and correctly charged, without exception, that the officers "had an interest in the case" and that the jury was free to disregard part or all of any witness's testimony (cf. *Korte* v. *New York, N.H. & H.R. Co.*, 191 F.2d 86, 88 [2d Cir. 1951]; *Rowe* v. *Pennsylvania Greyhound Lines*, 231 F.2d 922, 924 [2d Cir. 1956]; *Lebrecht* v. *Bethlehem Steel Corp.*, 402 F.2d 585, 589 [2d Cir. 1968]; *Lee* v. *City Brewing Corp.*, 279 N.Y. 380, 384).

Thus, the jury had the right to reject the police officers' testimony including, but not limited to, their claim that there was a break in the pursuit at 83rd Street and Lexington Avenue when the Thunderbird allegedly came to a stop. Instead, the jury had the right to find that the pursuit continued uninter-

(footnote continued on following page)

The officers had already noted and jotted down the license number of the Thunderbird (56). They admittedly did not know at that time that the Thunderbird was a stolen car (120). They did not put in a radio call for a road block or assistance (69-70).

The officers' testimony concerning continuation of the pursuit down Lexington Avenue leading to the collision

The Thunderbird turned left onto Lexington Avenue at a speed of approximately 50 to 55 miles per hour with the police car about 20 or 25 feet behind it (63, 80, 118). The staggered lights on Lexington Avenue were turning red as they proceeded south (64) and the Thunderbird went through red lights at 82nd Street and 81st Street (69). The Thunderbird accelerated to about 70 or 75 miles per hour (64). Officer Gallagher stated that "I was trying to catch him", that Gallagher was going "as fast as he was", was travelling at "whatever speed I thought necessary to catch him" (64-5). Officer Jaques confirmed that the speeds were "high" (119, 129). Other traffic pulled out of the way as the pursuit took place (135).

Officer Gallagher conceded that he *knew* the police Plymouth could not overtake the Thunderbird on speed. He was hoping for blocked traffic or that the driver of the Thunderbird "would stop for something" (67, 89). The disinterested eyewitness (Michael Ferder) testified that he did not think the police car was gaining on the Thunderbird (176). Officer Jaques impliedly acknowledged the danger to others when he testified that if the

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(footnote continued from preceding page)

rupted from the time the police spotted the traffic violation at 82nd Street and First Avenue until the collision at 30th Street and Lexington Avenue. Additionally, it was within the jury's province to reject the officers' testimony that the driver of the Thunderbird had tried to run down Officer Jaques, that Lee Johnson was the driver of the Thunderbird, etc.

chase had lasted any longer than it did, they probably would have given it up (127).

The Thunderbird went through a red light at 80th Street and struck the Cadillac limousine with such force as to hurl it up onto the southeast corner and into the door of a church after it had bounced off a parked car (66-7).

The officers' testimony concerning events immediately following the collision

The two police officers claimed that the driver's door of the Thunderbird was jammed, that they both had to pull to get it open, and that the only person in the car was a black man with a mustache by the name of Lee Johnson (72-4, 132-3). As shall now be shown, that testimony was flatly contradicted by other testimony.

The testimony of Michael Ferder and Lee E. Johnson

Michael Ferder was walking along 82nd Street toward Lexington Avenue when he heard a siren (163). He saw the Thunderbird doing more than 70 miles an hour (175) but did not know the speed of the police car (176). He claimed the flashing red light on the police car was working (164).

He witnessed the collision (166). He then saw the door on the driver's side of the Thunderbird open while the police were still at the Cadillac and saw a white man running away (171-2). He heard the police shouting "Stop that man" but the police did not go after the white man (172). Parenthetically, at the criminal trial of Lee Johnson, Officer Jaques testified that he yelled "Stop that man" as he (Jaques) raced toward the Thunderbird following the accident (121).

Lee Johnson testified at a motor vehicle hearing that he was not the driver of the Thunderbird (37, 40). He

claimed that he was a passenger, intoxicated and asleep at the time of the operative events, and that a man "by the name of T.J." whom he had met at a party was driving (38-9). Johnson was arrested and charged with attempted murder of Officer Jaques, two counts of vehicular homicide, seven counts of assault, theft of a vehicle and motor vehicle violations (40-1, 128).

When Michael Ferder read of Mr. Johnson's arrest in a newspaper, he went to the police and to the District Attorney and informed them that he had observed a white man getting out of the driver's side of the Thunderbird immediately after the accident (171-3). Mr. Ferder so testified at Johnson's criminal trial as a consequence of which Johnson was acquitted (41, 174).

The expert testimony

Plaintiff called David Fallek who had retired from the New York City Police Department with the rank of Inspector, assigned to the 19th Precinct, the same precinct to which Officers Jaques and Gallagher were assigned at the time of the accident (46, 96). Regarding vehicular pursuit, he stated that the Department had certain rules and policies (96a).* He explained that consideration was to be given to such factors as the safety of the public and the gravity of the crime or violation committed by the pursued party (97-8). Thus, "If a man ran a red light you are not going to go, to use a hell-bent for leather right down" (98).

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* Officer Gallagher admitted the Department had such rules and that, although he had received training regarding pursuit with a police car, he "didn't know what they were" (77-77a).

Officer Jacques conceded that if the driver of the Thunderbird had gotten away, there was no danger to anyone (124). He further admitted that pursuit should be abandoned if anyone is in danger (124). In this latter regard, it must be remembered that the officers also saw the Thunderbird going through red lights at 82nd and 81st Streets as it proceeded down Lexington Avenue (69).

One method was to "pull up alongside of him and you block him off and you wave him off to the side" (99).

In answer to a hypothetical containing the facts that occurred when the Thunderbird allegedly stopped at 83rd and Lexington Avenue for the red light, Inspector Fallek testified that proper police procedure would have been to block off the Thunderbird so it could not have moved, for one of the officers to have gone to the driver's side and have asked for or taken the ignition key after directing the driver to shut off the ignition (100-3).

Regarding a hypothetical encompassing the facts that occurred when the Thunderbird turned onto Lexington Avenue, the Inspector stated that proper procedure would have been to turn the flashing red light off, not use the siren, slowly follow the car, follow "discreetly" and radio ahead (104-7). As he graphically put it, turning on the flashing red light and the siren was "like waving a red flag in front of a bull. He is going to accelerate further" (106).

He further explained that safeguarding human life takes precedent over everything else, especially the issuance of a traffic violation (108-9). He maintained that the police should "have held their distance back" and follow the traffic violator discreetly "without alarming this particular motorist into doing anything foolishly" like accelerating the Thunderbird and thereby creating a worse situation (111-2).

Plaintiff also called Matthew J. Neary, a professor of police science at John Jay College of Criminal Justice who had been on the New York City Police force for 26 years and retired as a deputy Inspector (146). As a Captain he had been assigned to the Police Academy, part of which program dealt with procedures for high speed chases (146a).

Regarding high speed chases, he stated that the Department policy required careful consideration of various fac-

tors including the severity of the offense committed, the presence of other vehicles and the safety of other vehicles (147). That policy further required that a chase should be terminated "if at any time the safety of the officer or any other persons in the vicinity was endangered to the extent that any of them might be severely injured" (147-8).

In answer to a hypothetical setting forth the fact that the Thunderbird went through red lights at 82nd and 81st Streets, he stated that "the officer should have given serious consideration to discontinuing that chase" (153).

The testimony of plaintiff's experts dovetailed with the provisions of section F of the Police Academy training memo dealing with safety considerations during a high speed pursuit (Pltf.'s Exh. 18). Section F of that memo reads as follows:

"1. Use good judgment in initiating a motor vehicle pursuit, weigh the following factors:

   a. The crime, offense or violation committed or suspected.

   b. Density of vehicular and pedestrian traffic.

   c. Safety of other motorists, pedestrians and members of the force involved.

   d. Probability of overtaking the pursued vehicle without unnecessary risks.

2. Once the pursuit is initiated:

   a. Use warning light and siren.

   b. Drive defensively.

   c. Keep the car under control.

   d. Regulate speed according to traffic, weather, visibility and road conditions.

e. Use radio to request the assistance of other units in the area in apprehending the pursued motorist.

f. Abandon the pursuit if good judgment indicates the risks involved do not warrant continuance.

g. Comply with R&P 14/32.0 (Traffic Violation—unable to serve summons) where applicable."

Significantly, defendant was unable to produce a single expert witness to counter or refute any of the aforesaid expert testimony.

POINT I

The evidence was sufficient for the jury to find that the high-speed chase by the police for a minor traffic violation created an unreasonable risk to public safety, did not accord with common and accepted good police practices, and was a proximate cause of the collision.

Preliminary

It is settled that a municipality may be held liable for injuries to innocent parties arising out of the negligence of police officers (*Myers* v. *Town of Harrison,* 438 F.2d 293 [2d Cir. 1971], cert. den. 404 U.S. 828; *Thain* v. *City of New York,* 35 A.D.2d 545, aff'd 30 N.Y.2d 524; *Schuster* v. *City of New York,* 5 N.Y.2d 75, 81; *Alexander* v. *City of New York,* 53 A.D.2d 846; *Brennan* v. *City of Albany,* 284 App. Div. 997). Those cases make it unequivocally clear that, given sufficient evidence, the issue of negligence is for the jury (see, also, *Stanton* v. *New York,* 29 A.D.2d 612, aff'd 26 N.Y.2d 990, 992).

The question presented, then, is whether the jury was justified on the evidence in finding that the police officers

had negligently disregarded the standards of care applicable to the factual situation.

It is fundamental that the care required of the officers was relative to the danger to be avoided and the consequences that might reasonably be anticipated from neglect (*Sadowski* v. *L.I.R.R. Co.*, 292 N.Y. 448, 455; *Caldwell* v. *Village of Island Park*, 304 N.Y. 268, 274). It is indisputable on the record in this case that the Vehicle and Traffic Law as well as the procedures enunciated by the New York City Police Department relating to high speed pursuits specifically circumscribed the duties and standards of care required of those officers. We respectfully submit that, on the evidence adduced, a question of fact arose as to whether the officers breached those duties and standards of care and that the evidence fully justified the jury's verdict that they did, as a foreseeable and direct consequence of which the accident occurred.

The applicable standards of care

The Court below charged the pertinent provisions of sections 1104 and 1144 of the Vehicle and Traffic Law pertaining to authorized emergency vehicles as follows (199-200):

> "Now with respect to the police car driven by Officer Gallagher, under the New York law this is an authorized emergency vehicle, and there are specific regulations and laws which govern the operation of an authorized emergency vehicle.
>
> Among these are that the driver should drive at a slow rate of speed except under exceptional or extreme emergency, and the vehicle and traffic law provides that the driver of an unauthorized emergency vehicle, when in the pursuit of an actual or suspected violator of the law, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
>
> The statute goes on to say 'The driver of an authorized emergency vehicle may proceed past a steady

red signal, a flashing red signal, or a stop sign, but only after slowing down as may be necessary for safe operation, that he may exceed the maximum speed limit so long as he does not endanger life or property'.

Then the statute provides that these provisions that I have just read you 'shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of other.'

Now going further into the vehicle and traffic law, and this would apply to the defendants here, 'it is the duty of each of the drivers to operate his automobile with reasonable care, having regard to the actual and potential hazards existing from weather, road, traffic, and other conditions.'

Each of them was under a duty to obey the traffic lights and, of course, the City vehicle, as I told you before, had greater privileges on that, but the statute provides that each of them was under a duty to obey traffic lights and to maintain a reasonable safe rate of speed, to have his automobile under reasonable control, and to keep a proper lookout under the circumstances existing to see and be aware of what was in his view, to use reasonable care to avoid an accident."

Additionally, it will be recalled that the two experts called by plaintiff cumulatively testified that the Police Departm nt rules and policy required:

(i) that the officers should have blocked off the Thunderbird if and when it allegedly stopped on 83rd Street at Lexington Avenue (102-3)—the police having admitted that they could have passed the Thunderbird on its right if they "chose to do so" (116),

(ii) that an officer should have gone to the driver's side of the vehicle, instead of standing in front of it, and taken the ignition key after having directed the driver to turn off the ignition (103),

(iii) that, believing the driver of the Thunderbird to have only committed a minor traffic violation, the officers should only have followed the Thunderbird "discreetly" or slowly at a distance without use of the siren and flashing red light so as not to precipitate foolish actions by the driver of the Thunderbird (105-7, 111), and

(iv) that the officers should have radioed for assistance rather than engage in a "hell-bent for leather" high-speed chase culminating in this disastrous collision (98, 106, 148-148a).

At pages 26 and 27 of its brief the defendant propounds a convoluted argument that tacitly but implicity proceeds on the fallacious predicate that plaintiff's expert, Inspector Fallek, testified that it was proper police practice for the police officers to have pursued the Thunderbird at a high rate of speed through City streets without sounding the siren. He did not so testify.

Rather, he testified unequivocally that taking into consideration the minor traffic violation for which the Thunderbird was being pursued, traffic conditions, and the inability of the police car to overtake the pursued vehicle (97), proper police procedure mandated that the officers should not have used the siren (107) or the flashing red light but should merely have followed the Thunderbird *slowly and discreetly* and radioed ahead for assistance (104-7). Inspector Fallek emphasized that the risks to the safety of others under the circumstances of this case far outweighed any harm to the community if the traffic violator were not immediately apprehended (97-8, 108-9, 110).

Pure logic leads ineluctably to the conclusion that if police are going to engage in a justifiable high-speed pur-

suit (which the instant one was not because of the minor nature of the traffic infraction, the nature of the area, the conceded inability of the police car to overtake the Thunderbird), the siren and flashing red light must be used in an attempt to alert others in the area of the ongoing chase. That conclusion accords with the provision of section 1104(e) of the Vehicle and Traffic Law that the driver of an authorized emergency vehicle is not relieved "from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."

Moreover, the Police Academy training memo expressly directed that once a high speed pursuit is initiated, the police must "Use warning light and siren".

The negligent disregard of those standards by the officers

Assuming *arguendo* that the Thunderbird did stop on 83rd Street at Lexington Avenue, the uncontradicted expert testimony established that the officers failed to follow correct police procedure which called for them to attempt to block off the Thunderbird and by having one of them go to the driver's side of the Thunderbird to take the ignition key after directing the driver to turn off the ignition. The jury may well have concluded that the officers were negligent in failing to do so and that absent such negligence, the chase and collision would not have occurred.

Still further, it was conceded that before turning onto Lexington Avenue and engaging in the 70 to 75 mile an hour chase, the officers had already jotted down the license plate of the Thunderbird whose driver they then thought had only committed a minor traffic violation. The expert testimony, considered in conjunction with the Police Training memo, established beyond doubt that police rules and policy mandated that the officers should have exhibited due

regard for the safety of the public by radioing ahead for assistance while discreetly following the Thunderbird at a distance.

Instead, they arbitrarily conducted a pursuit through the City streets in such manner that both cars reached a speed of between 70 and 75 miles an hour at the time of the collision, knowing full well that the Plymouth did not have the inherent power to overtake the Thunderbird. There is a conflict in the testimony as to whether the police had the car siren on prior to the accident. It will be recalled that Howard Camac who was seated next to the right window in the front of the car did not hear a siren even though his window was slightly open (23-4). Clearly, the jury could infer that he would have heard a strident, blaring police siren in the immediate vicinity if, in fact, the officers had been using the siren.

This is not a case of hindsight disclosing alternate methods of pursuit that were safer than the course adopted by the officers. Rather, it is a case of the officers acting in a reckless and unsafe manner in the first instance by adopting a course of conduct that flagrantly contravened (1) the rules and policies of their own police department governing the subject of pursuit and (2) the applicable provisions of the Vehicle and Traffic Law. The jury was fully justified in finding that such conduct constituted actionable negligence in that it precipitated the series of events leading to the collision. Directly applicable in principle is the case of *Myers* v. *Town of Harrison,* 438 F.2d 293 [2d Cir. 1971], cert. den. 404 U.S. 828.

In that case an officer of the Harrison Police Department was told by an unidentified motorist that a black Pontiac had just backed into his parked car. The officer pursued the vehicle driven by one Smith in order to ascertain whether it had been involved in the incident reported to him. The officer turned on his lights and siren but the Smith vehicle failed to stop. The officer pursued Smith

through the Town of Harrison at speeds ranging up to 100 miles per hour and two other police vehicles joined in the chase.

In the interim, another officer of the Harrison Police Department had placed his vehicle diagonally across a street in Harrison at the bottom of a steep hill where a driver heading toward it would not be able to see it until reaching the top of the hill some 600 to 800 feet away. Expert testimony established the speed of the Smith car would require a stopping distance of 1750 feet.

The Smith car struck the police car which had been placed diagonally across the street and also a taxi whose driver had stopped to inquire what was occurring. The taxi driver was killed.

In affirming a jury verdict in favor of the taxi driver's administratrix on liability against the Town of Harrison, this Court wrote at page 296:

> "Here * * * the trier of the fact has found such negligence on the part of appellant, and the only question before this Court is whether there was sufficient evidence on this question to allow it to be submitted to the jury. Speeds of up to 100 miles per hour on wet and narrow roads, through a residential section, in pursuit of a traffic violator might well be said to create an unreasonable risk to public safety and there was expert testimony that pursuit in these circumstances does not constitute 'common and accepted good police practices'."

The Court stated further (p. 297):

> "* * * the excessive speed of the Smith vehicle could be said to have resulted from the fact that he was being pursued by the police, and it was rather clearly this high rate of speed which caused him to lose control of the car."

As in the instant case, the Harrison police were unaware that the Smith car had been stolen. In that regard the Court wrote (p. 296):

> "The after-acquired information that the pursued vehicle had been stolen does not excuse the negligence involved in the method of apprehending a person known only to have been involved in a minor traffic accident. [N.B. McCormick v. State, 34 Misc.2d 896, 229 N.Y.S.2d 441 (1962)]."

What the Court wrote (p. 296) concerning the concurrent negligence of Smith is equally applicable here with regard to the negligence of the driver of the Thunderbird:

> "Smith was also obviously guilty of negligent conduct, but this does not discharge the appellant's liability as a joint tortfeasor. The degree of culpability of each does not affect their respective responsibilities, for each is separately liable for the full extent of the damage caused [citing cases]."

We submit that the *Myers* case illustrates that the jury verdict herein was fully warranted (see, also, *Thain* v. *City of New York*, 35 A.D.2d 545, aff'd 30 N.Y.2d 524; *Jansen* v. *State*, 60 Misc.2d 36, aff'd 32 A.D.2d 889; *Alexander* v. *City of New York*, 53 A.D.2d 846; *Brennan* v. *City of Albany*, 284 App. Div. 997; *LoCicero* v. *Columbia Casualty Company*, 268 F.2d 440 [5th Cir. 1959], cert. den. 361 U.S. 917).

Defendant derives no comfort from the decision in *Stanton* v. *State of New York*, 29 A.D.2d 612, aff'd 26 N.Y.2d 990. There, the Appellate Division was reviewing a non-jury trial in the Court of Claims where the trial judge had decided as a question of fact that the pursuing trooper was not negligent. Indeed, the New York Court of Appeals specifically stated that "there was an issue of fact" as to whether or not the trooper was negligent (26 N.Y.2d at p. 992).

In the case at bar, on the other hand, the jury found that the police officers were negligent and that finding is fully supported by the evidence.

Finally, the questions of precisely where the pursuit began and whether it was a continuous pursuit until the time of the collision or was broken by a temporary stop on 83rd Street and Lexington Avenue were questions of fact for the jury. We contend that the jury could conclude that the pursuit commenced at 82nd Street and First Avenue when the officers admittedly turned on the flashing red light and accelerated their speed in following the Thunderbird (46-7, 49).

The jury likewise was entitled on this record to conclude that there had not been any stopping on 83rd Street and Lexington Avenue but that the pursuit was an uninterrupted one covering seven long City blocks until the time of the collision.

Manifestly, the story told by the police officers concerning the alleged attempt by the Thunderbird's driver to run down Officer Jaques was intended to provide a reasonable basis or excuse (attempted murder) for the high-speed chase down Lexington Avenue, inasmuch as the minor traffic violation committed by the Thunderbird's driver could not and did not warrant such a chase. The jury had the right to reject the officers' testimony, especially since their credibility had been seriously impaired on a material fact by the testimony of the disinterested witness, Michael Ferder, who, contrary to the officers' testimony, asserted that a white man had gotten out of the driver's side of the Thunderbird immediately after the accident.

In that regard, the jury also could have considered the admission by Officer Jaques that he had shouted "Stop that man" (meaning the white man) (121), notwithstand-

ing that both officers had testified that when the Thunderbird had allegedly stopped on 83rd Street at Lexington Avenue, the only person in the car was a black man with a mustache. The impairment of the police officers' testimony was such as to warrant the jury invoking the doctrine of *falsus in uno, falsus in omnibus* (*Mastrangelo* v. *Strype*, 39 A.D.2d 922; *People* v. *Perry*, 277 N.Y. 460, 467-8; Fisch, *New York Evidence*, §§ 483, 485).

In short, contrary to defendant's argument (Deft.'s Br., pp. 3, 18), the jury was empowered on the proof adduced and under the charge to find that the pursuit was a continuous one starting at a speed of 30-35 miles per hour at 82nd Street and First Avenue when the officers put on the flashing red light, continued uninterruptedly over a seven block area in the heart of Manhattan, and terminated at the time of the collision after both cars had reached speeds up to 70 or 75 miles per hour on a main City thoroughfare.

The totality of facts proven in this case show that the police officers were guilty of actionable negligence.

POINT II

The only issue in the case regarding pursuit was whether the City was negligent in the manner of pursuit and the Court so instructed the jury. There was no claim that the City did not have the right to pursue and, accordingly, the Court correctly denied defendant's requested charge number 3.

The argument propounded by defendant in Point II of its brief is bottomed on a fallacious hypothesis, viz., that there was an issue in the case as to whether the City could be liable merely for undertaking pursuit. There was no such issue.

The only claim made by plaintiff regarding pursuit was that the officers had undertaken it in a negligent manner.

The Court in its charge delinated for the jury the precise issue to be resolved on the subject of pursuit:

> "* * * plaintiff contends that Gallagher and Jaques in their pursuit here were negligent *in the way they did it.*" (Emphasis supplied)

It will be recalled that the gist of the testimony of plaintiff's experts was not that the officers did not have the right to pursue but that they should only have done so in a manner that accorded with good police practice (radioing for assistance, following slowly and discreetly, etc.).

At page 33 of its brief defendant asserts that plaintiff's counsel contended in summation that it was negligent for the police to have undertaken pursuit, citing pages 440 and 441 of the appendix. By no stretch of the imagination can any such interpretation be culled from plaintiff's counsel's remarks as recorded on those pages or anywhere else in the record.

Defendant's requested charge number 3 pertained to an issue not raised in the case and, accordingly, was properly denied.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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hereby admitted this day
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Attorney for